2002 WL 32134164 (U.S.) (Appellate Petition, Motion and Filing)
Supreme Court of the United States.

James K. HAVEMAN, Jr., Director of the State of Michigan, Department of Community Health, Petitioner,
v.
Westside MOTHERS, a Michigan Welfare Rights Organization, et al., Respondents.

No. 02-277.
August 13, 2002.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Petition for a Writ of Certiorari

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***i** QUESTIONS PRESENTED FOR REVIEW

This suit filed under 42 USC § 1983 alleges that officials of the state of Michigan have failed to provide eligible Medicaid recipients in Michigan with Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) services as defined in Title XIX of the Social Security Act, 42 USC § 1396 *et seq.*

1. Does sovereign immunity bar a suit by private individuals and organizations against state officials for alleged violations of a federal statute enacted under the Spending Clause of the United States Constitution, Art 1, § 8?

2. Does 42 USC § 1983 create a private cause of action available to enforce the EPSDT provisions of Title XIX of the Social Security Act, 42 USC § 1396 *et seq*?

3. Do organizations representing doctors and dentists have standing to sue state officials for alleged violations of Title XIX of the Social Security Act, arising out of the State's administration of the EPSDT provisions of Title XIX of the Social Security Act?

***ii PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS**

Appellants in the Court of Appeals were: Westside Mothers, Families On The Move, Inc., American Academy Of Pediatrics, American Academy Of Pediatric Dentists, M.B., by her next friend Tricia G., B.K., by her next friend Lois Ann K., D.J., by her next friend Tangela W., DN. J., by her next friend Tangela W., DM. J., by his next friend Tangela W., K.K., by her next friend Vicki K., K.T., by her next friend Veda T., J.T., by his next friend Veda T.

Appellees in the Court of Appeals were: James K. Haveman, Jr., Director of the State of Michigan Department of Community Health, Robert Smedes, Deputy Director of the Medical Services Administration. Robert Smedes, Deputy director of the Medical Services Administrator, has been omitted from the caption of the case because he is no longer a state official and the agency within the Michigan Department of Community Health referred to as the Medical Services Administration no longer exists.

The United States of America participated as an Intervenor at the request of the Court of Appeals.

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*1 OPINIONS BELOW

The opinion of the Court of Appeals (App 1a) is reported at 289 F3d 852. The March 26, 2001 opinion of the District Court dismissing all remaining claims (App 21a) is reported at 133 F Supp 2d 549. The December 28, 1999 order of the District Court dismissing organizational respondents for lack of standing (App 98a) is unreported.

JURISDICTION

The Court of Appeals entered judgment on May 15, 2002. App 1a. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following constitutional provisions statutes and regulations appear in the Appendix, included *infra*, at the pages noted in the table of contents.

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***2** STATEMENT OF THE CASE

Respondents filed this lawsuit on July 12, 1999, claiming a cause of action under 42 USC § 1983 and federal jurisdiction under 28 USC § 1331. Respondents (eight Medicaid recipients under age 21 and six organizations) allege that Petitioners James Haveman and Robert Smedes, in their official capacities as Director and Deputy Director of the Michigan Department of Community Health (DCH)[1], deny certain medical benefits to children under the state's Medical Assistance (Medicaid) program, in violation of Title XIX of the Social Security Act, 42 USC § 1396 *et seq.* (Medicaid Act). Respondents claim that they have a federal cause of action against the Petitioner under 42 USC § 1983 for prospective injunctive relief to enforce their asserted rights under Title XIX. (App 146a)

Medicaid is a jointly funded federal-state program established by Congress for the purpose of "enabling each State, as far as practicable under conditions in such State," to furnish medical assistance and other related services to indigent individuals. States participate in the Medicaid program through ***3** """state plans" which are submitted to, and approved by, the Secretary of the U.S. Department of Health and Human Services (HHS). 42 USC § 1396. Specifically, Respondents allege that the Petitioner denies Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) services to Medicaid recipients. EPSDT is a group of specific services defined under 42 USC § 1396a(a)(43) and 1396d(r), available to Medicaid recipients under age 21.

Respondents also claim that the "managed care" program administered by Petitioner causes Medicaid recipients to be denied EPSDT services. Under 42 USC § 1396u-2(a), states may "require an individual who is eligible for Medicaid under the state plan ... to enroll with a managed care entity as a condition of receiving such assistance," so long as certain specified conditions are met. A managed care entity "provides or arranges for services for enrollees under a contract [with the state] pursuant to [42 USC 1396b(m)]." Managed care entities, also referred to as health maintenance organizations (HMOs) and

managed care organizations (MCOs), will be referred to in this petition as MCOs. All of the named Respondents were enrolled in MCOs.

Respondents' Complaint consists of five counts: (1) denial of EPSDT screening to Medicaid recipients; (2) denial of EPSDT treatment to Medicaid recipients; (3) denial of EPSDT outreach and information; (4) denial of transportation and scheduling assistance under the EPSDT program; and (5) failure to secure capacity to deliver EPSDT services. Respondents seek injunctive relief """"prohibiting [Petitioner] from violating the rights of [Medicaid recipients] as complained of [in their Complaint] and requiring them to take such actions as are necessary to remedy their past violations." They also request appointment of "a Special Master ... to oversee [Petitioner's] compliance ...."

***4** On November 9, 1999, Petitioner filed a motion for judgment on the pleadings and/or summary judgment against the individual Respondents on the grounds: that Respondents failed to allege any facts establishing that they were injured by any violation of the Medicaid Act; that Respondents lacked standing; that the statutes and regulations Respondents relied on did not create a private cause of action under 42 USC § 1983 in accordance with *Blessing v Freestone,* 520 US 329 (1997); that in the absence of allegations that Petitioner's policies or procedures violated a specific provision of the Social Security Act, Respondents failed to state a claim; and that based on accompanying affidavits and exhibits, there were no material issues of fact as to whether Petitioner was in violation of the Medicaid Act. Petitioner also filed a motion for judgment on the pleadings against the organizational Respondents on the grounds that those Respondents lacked standing. On December 21, 1999, the District Court issued an order dismissing Respondents' transportation claim. The Respondents did not appeal this ruling. On December 28, 1999, the District Court issued an order granting Petitioner's motion to dismiss all organizational Respondents except Westside Mothers and Families on the Move, finding that these Respondents had met the "factors for associational standing at the pleadings stage." (App 110a)

The District Court issued its opinion on March 26, 2001, granting judgment to Petitioner on all remaining claims, on the basis that sovereign immunity bars Respondents' claims and that 42 USC § 1983 afforded no private cause of action for challenging the administration of federal programs adopted under the Constitution's Spending Clause. The District Court did not address any of the grounds for dismissal raised by Petitioner in his motion for judgment on the pleadings and/or summary judgment.

Respondents appealed to the Sixth Circuit Court of Appeals on April 4, 2001. On May 15, 2002, the Court of Appeals ***5** issued its judgment and opinion, reversing the District Court's March 26, 2001 judgment dismissing Respondents' claims and reversing the District Court's December 28, 1999 order dismissing the American Academy of Pediatrics and the American Academy of Pediatric Dentists on standing grounds.

REASONS FOR GRANTING THE WRIT

The District Court in this case properly held that Respondents' claims were barred by the Eleventh Amendment and that Respondents could not rely on *Ex parte Young,* 209 US 123 (1908), as a basis for jurisdiction over defendant state officers, acting in their official capacities.

The District Court concluded that *Young,* does not provide a basis for jurisdiction over state officers in this case: because Respondents allege a violation of Spending Clause legislation which is not "supreme law of the land"; because Respondents' claims are contractual in nature and that *Young* does not apply to breach of contract claims; because Respondents have alleged no *ultra vires* acts by Petitioner; because the duties Respondents seek to enforce are discretionary; and because the Medicaid Act provides its own detailed remedies. Alternatively, the District Court concluded that Respondents' claims should be dismissed on the grounds that 42 USC § 1983 does not create a private right of action for enforcement of federal programs enacted under the Spending Clause, unless the substantive legislation clearly creates such a right. There is no such clear statement in the Medicaid Act.

Although this Court has not squarely addressed these issues, several of the Court's recent decisions concerning the scope of the Eleventh Amendment and 42 USC § 1983 support the District Court's conclusions. The Sixth Circuit Court of Appeals disagreed. These important questions of federal law and State-Federal relationships should be settled by the Court.

***6** Additionally, assuming *arguendo* that 42 USC § 1983 ever authorizes a private cause of action for enforcement of Spending Clause legislation, the Court of Appeals decision conflicts with this Court's ruling in *Blessing v Freestone,* 520 US 329 (1997), in finding that Respondents adequately pled an enforceable cause of action for relief under 42 USC § 1983. The Sixth Circuit's incorrect application of *Blessing* becomes more apparent in light of this Court's most recent decision in *Gonzaga University v Doe,* ___ US ___; 122 S Ct 2268 (2002). The Court of Appeals also misapplied *Blessing* and ignored other relevant precedent of this Court when it reversed the District Court and found that associations of dentists and doctors had standing to litigate Respondents' claims that children were being denied Medicaid EPSDT services in violation of the federal Medicaid statute.

I. *EX PARTE YOUNG* DOES NOT OVERRIDE THE STATE'S IMMUNITY IN THIS CASE.

The *Ex parte Young* doctrine permits prospective injunctive relief against state officers in *certain* circumstances when the state itself would be immune from suit. But, "courts have not read *Young* expansively." *Children's Health Care Is A Legal Duty, Inc. v Deters,* 92 F3d 1412, 1415 (6th Cir 1996). See also, *Pennhurst State School and Hospital v Halderman (Pennhurst II),* 465 US 89, 102-103 (1984), and *Idaho v Coeur d'Alene Tribe of Idaho,* 521 US 261, 270, 278-280 (1997). Young is based on the legal fiction that where a state officer's authority to act is in conflict with federal law, "he is ... stripped of his official ... character and is subjected in his person to the consequences of his individual conduct," because "[t]he state has no power to impart to him any immunity from responsibility to the supreme authority of the United States." 209 US 123 at 160.

The District Court based its decision regarding Eleventh Amendment immunity on five separate and independent ***7** grounds, any one of which, standing alone, supports dismissal of Respondents' claims.

A. Legislation enacted under the Spending Clause is not the supreme law of the land.

The District Court noted that the "fiction" of *Ex parte Young* was created to """give life to the Supremacy Clause." 133 F Supp 2d 549 at 560, citing *Green v Mansour,* 474 US 64, 68 (1985). (App 38a-39a.) *Young* provides a remedy to end a continuing violation of federal law if such federal law is the supreme law of the land. *Id.* However, as the District Court emphasized, neither *Ex parte Young* nor the numerous Supreme Court cases applying it have directly analyzed whether all federal laws are to be considered supreme for purposes of applying the doctrine.

The Constitution grants Congress the power to "lay and collect Taxes, Duties, Imposts and Excises to ... provide for the ... general Welfare of the United States." US Const, Art I, § 8. Incident to this power, "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." *South Dakota v Dole,* 483 US 203, 206 (1987). The Medicaid program was enacted pursuant to Congress's spending power, to provide """federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons." *Harris v McRae,* 448 US 297, 301 (1980).

The District Court below reasoned that because the requirements of legislation enacted under the Spending Clause are not binding upon the states, except where mutually agreed to in the form of a contract between the state and the federal government, Spending Clause legislation cannot be considered supreme law of the land. ***8** 133 F Supp 2d at 561-562. (App 40a-44a.) This analysis finds support in other cases. In *Brogdon v National Health Care Corp,* 103 F Supp 2d 1322 (ND Ga 2000), another district court held that Spending Clause legislation like the Medicaid Act cannot preempt state laws, because legislation enacted under the Spending Clause is not the supreme law of the land:

To be sure, the States must comply with Medicaid ... participation requirements in order to continue to receive federal funds. But the authority to require compliance with participation standards is derived not from the primacy of federal law enacted pursuant to an enumerated power but from the terms of a contract and the agreement to abide by those terms in return for the receipt of federal moneys. [*Id.* at 1399.]

Justice Burger expressed a similar view in a concurring opinion in *Townsend v Swank*, 404 US 282 at 292 (1971):
[I]t seems appropriate to keep clearly in mind that Title IV of the Social Security Act governs the dispensation of federal funds and that it does no more than that. True, Congress has used the "power of the purse" to force the States to adhere to its wishes to a certain extent; but adherence to the provisions of Title IV is in no way mandatory upon the States under the Supremacy Clause ....

If, as the foregoing analysis suggests, Spending Clause legislation such as the Medicaid Act is not supreme law, the *Ex parte Young* doctrine, which flows from the Supremacy Clause is not available to circumvent the state's Eleventh Amendment immunity.

***9 B. *Ex parte Young* does not apply to claims based on breach of contract.**

Participation by the states in federal-state grant programs such as Medicaid is voluntary and "the States are given the choice of complying with the conditions set forth in the Act or foregoing the benefits of federal funding." *Pennhurst State School and Hospital v Halderman (Pennhurst I),* 451 US 1, 11 (1981). Under 42 USC § 1396, "If a State agrees to establish a Medicaid plan that satisfies the requirements of Title XIX, ... the Federal Government agrees to pay a specified percentage of 'the total amount expended ... as medical assistance under the State plan'.'DD' *Harris v McRae, supra,* at 308. "The sums made available under this section shall be used for making payments to States which have submitted, and have approved by the Secretary, State plans for medical assistance." 42 USC § 1396. 42 USC § 1396a(a) sets forth the elements that a state must include in its state plan in order to obtain the approval of the HHS Secretary to participate in the Medicaid program, and the right to receive federal funding. EPSDT services are included under 42 USC § 1396a(a)(43).

42 USC § 1396c sets forth actions that the federal government may take if it finds that a state's Medicaid plan no longer complies with the provision of § 1396a, or that there is a failure to substantially comply with any provision of § 1396a. Under this provision, the federal government may withhold federal funds from substantially noncompliant states, but cannot compel compliance with any given state plan requirement.

In *Pennhurst I, supra,* at 17, the Supreme Court stated that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the states agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'.'DD' The District ***10** Court correctly concluded that the relationship between the state and federal government under Spending Clause programs is one of contract. The relationship is no less a contract simply because many of the terms agreed upon originate in federal statute.

The Eleventh Amendment is a jurisdictional bar to suits brought against a state by its own citizens, where the state has not consented to suit. *Kimel v Florida Board of Regents,* 120 528 US 62, 75 (2000). Michigan has not waived its immunity in this case. Furthermore, since the Medicaid Act contains no clear condition requiring a state to waive its Eleventh Amendment immunity, participation in the program cannot be construed as a waiver. Congress may impose conditions on the states under federal spending programs, but where it does so, "it must do so unambiguously." *Pennhurst I, supra,* at 17; *Suter v Artist M,* 503 US 347, 356 (1992).

If there is federal jurisdiction in this matter, it is only through the application of the *Ex parte Young* doctrine. However, as noted above, "the theory of *Young* has not been provided an expansive interpretation." *Pennhurst State School and Hospital v Halderman (Pennhurst II), supra* at 103. In this regard, the District Court below explained that under *In re Ayers,* 123 US 443 (1887), state officials were *not* stripped of their Eleventh Amendment immunity when a claim against a state official sought specific performance of a contract. That is precisely what Respondents were seeking in this lawsuit. *Ayers* held that in such actions, the state itself is the only real party-in-interest and the federal court has no jurisdiction to proceed against the state officer. Therefore, plaintiffs could not avoid the bar of sovereign immunity by naming the state officers as defendants. *Id.* at 490-492, 497-498. *Ayers* was discussed at length and relied upon in *Young* and was reaffirmed recently in *Idaho v Coeur d'Alene Tribe of Idaho,* 521 US 261 (1997) and *Alden v Maine,* 527 US 706 (1999).

***11** In light of the contractual nature of Spending Clause programs and the long-standing prohibition against applying *Ex*

parte Young to contractual claims, the Court of Appeals erred in overriding the state's sovereign immunity in this case.

C. *Ex parte Young* does not apply where, as here, Respondents have not alleged *ultra vires* acts by Petitioner.

Ex parte Young applies, if at all, where it is alleged that an action by a state officer violates federal law. In such case, the officer is said to be acting *ultra vires* and is not protected by the state's sovereign immunity. This Court in *Pennhurst II*, *supra*, at 101-102, 114, n. 11 and n. 25, emphasized that "the authority-stripping theory of *Young* ... has been narrowly construed" and applies only when a state officer acts without any valid authority whatever.

In this case, Respondents did not allege any act *by Petitioner* that violated federal law and therefore would strip Petitioner of immunity. The purely conclusory statements in the Complaint that Petitioner had violated various provisions of the Medicaid Act did not identify *what* the Petitioner had allegedly done that violated federal law. Respondents alleged that they had not received certain medical services. But nowhere did Respondents allege any specific unlawful acts by Petitioner that had supposedly caused their deprivation. Therefore, the District Court correctly held that *Ex parte Young* did not deprive Petitioner of sovereign immunity because Respondents had not alleged the requisite *ultra vires* acts by Petitioner.

As noted by the District Court below, "the test of whether sovereign immunity is overridden under *Young* 'turns on *whether the defendant state official was empowered to do what he did*, i.e., whether, even if he acted erroneously, it was within the scope of his authority'.'DD' (Emphasis added), 133 F Supp 2d at 569, citing *Pennhurst II, supra*, at 111-113, n 22. ***12** This Court has explicitly rejected the theory that "an officer given the power to make decisions is only given the power to make correct decisions.... [A]n officer might make errors and still be acting within the scope of his authority." *Pennhurst II, supra*, at 112, n 22. Similarly, an allegation that a state official has performed a statutory duty "inadequately" is also not sufficient to establish that the official was acting *ultra vires. Pennhurst II, supra*, at 101, n 11.

As noted above, in the instant case, Respondents did not identify in their pleadings *what* the Petitioner had allegedly done that violated federal law. Their Complaint contains only unconnected allegations that the Respondents had not received certain medical treatment, and then unsupported, conclusory allegations that the Petitioner had violated certain enumerated sections of the Medicaid Act. In other words, the Respondents have not identified what the Petitioner had done that is supposedly outside of the scope of his legal authority to administer the Medicaid program.

If Respondents had identified in their pleadings a policy adopted by Petitioner that was in conflict with the Social Security Act, or a practice knowingly endorsed by the Petitioner that directly violated the Social Security Act, it might be argued that Petitioner was acting *ultra vires* and, therefore, could be "stripped of his authority" for immunity purposes under *Ex parte Young*. But Respondents clearly did not do so. At best, Respondents' allegations amount to a claim that someone was not carrying out Petitioner's policies as well as they should be. This is far from a claim that *Petitioner* acted without legal authority in administering the Medicaid program, a necessary element of the *Young* doctrine. Furthermore, under *Rizzo v Goode*, 423 US 362 (1976) and *Monell v Department of Social Services*, 436 US 658 (1978), state officials cannot be held vicariously liable for the wrongdoing of an agent.

***13** Respondents cannot avoid the bar of sovereign immunity simply by pleading so broadly and so vaguely. If it were sufficient to simply plead that a state officer was violating a federal statute, every plaintiff could easily circumvent Eleventh Amendment immunity. This Court has made it clear that *Ex parte Young* is not to be applied so loosely: "The real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleadings. Application of the Young doctrine must reflect a proper understanding of its role in our federal system ... instead of a reflexive reliance on an obvious fiction." *Idaho v Coeur d'Alene Tribe of Idaho, supra,* at 270.

D. *Ex parte Young* does not apply to discretionary duties of state officers.

This Court in *Ex parte Young, supra*, at 158-159, unequivocally held that federal courts cannot control a state officer's exercise of discretion and that *Young* can only be applied to enforce ministerial duties. Courts "can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or

neglects to take such action. In that case the court can direct the defendant to perform this merely ministerial duty." *Id.* at 158. The federal Medicaid statute contains both discretionary and ministerial components. For example, it may be argued that the duty to include health screening services as a component of covered benefits under the state's EPSDT program is ministerial. However, the manner in which the policy is implemented, and implementation of any other details not spelled out in statute, are clearly discretionary functions.

Respondents have *not* pled that Petitioner failed to include mandatory elements from the EPSDT statute as covered benefits under the state's Medicaid program. To the contrary, Respondents specifically pled in their Complaint that Petitioner ***14** *did* include such coverage as part of the state's Medicaid program:

40. The rights and responsibilities of participating MCOs and enrolled Medical Assistance beneficiaries are set forth in contracts between the MCO and the State and between the MCO and its participating 'network' of providers.... [[[T]he contracts list the package of benefits that the MCO is required to provide to Medical Assistance beneficiaries .... Medical Assistance's EPSDT services, including outreach and transportation assistance, are included among the services for which the MCOs receive capitated payment. [App 164a].

There are no allegations in Respondents' Complaint that *Petitioner* denied any EPSDT services requested by Respondents. (App 145a-176a). Thus, Respondents' Complaint does not raise any factual claim that Petitioner failed to meet any of the ministerial requirements of the EPSDT statute: it is not challenged that Petitioner had in place an EPSDT program that covered each of the elements enumerated in 42 USC § 1396a(a)(43) and § 1396d(r). What Respondents complained about, however, was not whether these services were covered, but *how well* the program was working. See e.g. Complaint, ¶¶ 37-39, App 163a-164a. Respondents claimed that because Medicaid providers and MCOs were allegedly not *delivering* the service sufficiently, Petitioner must be ordered to do something (unspecified by Respondents) to improve performance. The fact that Respondents seek to control the state's discretionary actions is reflected in their requested relief: to have the District Court appoint a master to superintend Petitioner's management of the EPSDT program. (Complaint, App 175a)

Beyond defining the minimum elements each Medicaid program must contain, the administration of the program is left ***15** to the discretion of participating states. *Alexander v Choate,* 469 US 297, 307 (1985). The relief sought by Respondents in this case would supplant the Petitioner's discretion. As the District Court below correctly held, 133 F Supp 2d at 574:

This court's review of the statutes and regulations upon which plaintiffs' complaint relies as the basis for Messrs. Haveman's and Smedes' purported wrongdoing informs it that their responsibilities 'involve the paradigmatic exercise of discretion.' *Wisconsin Bell,* 57 F.Supp.2d at 713. That is, even if Michigan were obligated to provide all of the services plaintiffs argue are required ... the federal laws upon which plaintiffs rely do not explain how those levels of service are to be reached, nor do those federal laws require that the State provide service in a particular manner. Moreover, even if the responsible state officials are obligated to accomplish the purportedly federally-mandated goals, plaintiffs point this court to no statutes or regulations that deny those decision makers 'the character of judgment or discretion' in determining how to get there. *United States, ex rel. Girard Trust Co. v Helvering,* 301 U.S. 540, 543-44, 57 S.Ct. 855, 81 L.Ed. 1272 (1937).

E. *Ex parte Young* does not apply where the statutory scheme provides its own detailed remedies.

Seminole Tribe of Florida v Florida, 517 US 44, 74 (1996), provides that where Congress has prescribed a detailed remedial scheme for enforcement of rights under a substantive statute, federal courts should not afford an additional remedy against state officers based on *Ex parte Young:*

***16** Where Congress has created a remedial scheme for the enforcement of a particular federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary. *Schweiker v. Chilicky,* 487 U.S. 412, 423, 108 S.Ct. 2460, 2468, 101 L.Ed.2d 370 (1988) ("'When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration, we have not created additional ... remedies'). Here, of course, the question is not whether a remedy should be created, but instead is whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young,* in order to allow a suit against a state officer. Nevertheless, we think that the same general principle applies: Therefore, where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young.*

The District Court found that the federal funding reduction/cutoff mechanism established under 42 USC § 1396c was the type of limiting remedial enforcement provision that precluded it from exercising jurisdiction under *Ex parte Young* to consider more extensive remedial measures. 133 F Supp 2d at 575. (App 68a-69a.)

In fact, the remedial scheme created under the Medicaid Act is considerably more detailed than is described in the District Court's decision and consists of several inter-related remedies. In addition to the funding reduction remedy of ***17** 42 USC § 1396c, 42 USC § 1396a(a)(3) requires states participating in the Medicaid program to "provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for medical assistance under the plan is denied or is not acted upon with reasonable promptness." These hearing requirements have been fleshed out in considerable detail in the regulations promulgated under the Act. See 42 CFR 431.220-250. For example, 42 CFR 431.220 requires states to grant hearings to any Medicaid applicant whose claim for services has been denied or not acted upon with reasonable promptness and to any recipient who believes the agency has taken action erroneously. Under 42 CFR 431.230, if a Medicaid recipient makes a timely request for a hearing, in most cases, the state may not terminate or reduce services until after the hearing decision is rendered. 42 CFR 431.240 specifies details for conducting the hearing. 42 CFR 431.241 specifies matters to be considered at the hearing. 42 CFR 431.242 specifies the procedural rights of the recipient including, *inter alia*, the right to examine the content of the case file and all documents and records prior to hearing, the right to bring witnesses and present facts and argument without interference, and the right to refute any evidence and to cross-examine adverse witnesses. 42 CFR 431.244 specifies that hearing decisions must be based exclusively on the evidence introduced at the hearing. Final administrative action must be taken within 90 days from the date of the request for a hearing. Under 42 CFR 431.245, the recipient must be notified in writing of the decision and any right to seek judicial review provided under state law.[2] Under 42 CFR 431.246, a state agency must promptly make corrective payments, retroactive to the date of incorrect action if the hearing decision is favorable to the recipient. Through these detailed administrative remedies and subsequent judicial review Medicaid recipients have a more ***18** than adequate means of addressing any alleged violation of the Medicaid Act.

42 USC § 1396u-2(b)(4) provides additional remedial procedures for Medicaid recipients enrolled in managed care organizations. All of the individual plaintiffs in this case were enrolled in MCOs, as are approximately 75% of the EPSDT population. Under § 1396u-2(b)(4), Medicaid MCOs are required to """"establish an internal grievance procedure under which an enrollee who is eligible for medical assistance under the State plan under this title ... may challenge the denial of coverage or of payment for such assistance." Additionally, under 42 USC § 1396b(m)(5)(A), HHS may take action directly against a participating MCO if the Secretary determines that the entity has substantially failed to provide Medicaid services. Under this section, the Secretary may impose civil money penalties upon the MCO and/or deny payment to the state for medical assistance furnished under the contract.

The foregoing procedures, considered together, comprise an extensive and detailed complementary remedial scheme created for the benefit of Medicaid recipients. Under *Seminole Tribe, supra*, courts should refrain from also affording additional remedies under *Ex parte Young* where, as here, the Medicaid statute contains several interrelated detailed remedies for Medicaid recipients who have been denied rights or services under the Medicaid Act.

II. 42 USC § 1983 CREATES NO PRIVATE CAUSE OF ACTION FOR NONCOMPLIANCE WITH THE MEDICAID ACT.

A. 42 USC § 1983 creates no private cause of action for beneficiaries of Spending Clause legislation.

42 USC § 1983 imposes liability on anyone who, under color of state law, deprives a person of any right "secured by ***19** the Constitution and laws." However, not every federal statute creates a "right" enforceable under § 1983. *Blessing v Freestone*, at 340. In a concurring opinion in *Blessing*, Justice Scalia questioned whether § 1983 "ever authorizes beneficiaries of a federal-state funding and spending agreement ... to bring suit." *Id.* at 349. He pointed out that under contract law as it existed in 1871 when § 1983 was enacted, a """"third party beneficiary was generally regarded as a stranger to the contract and could not sue upon it." *Id.*

Although current law allows a third-party beneficiary to bring suit to enforce a beneficial interest in a contract, "the rights of donee beneficiaries were not clearly established until *Seaver v Ransom* (1918)." K. Teeven, *A History of the Anglo-American Common Law of Contract* 230 (1990). When § 1983 was enacted, it was widely maintained "that a person for whose benefit a promise was made, if not related to the promisee, could not sue upon the promise." C. Langdell, A *Summary of the Law of Contracts* 79 (2d ed. 1880). This rule followed from the widely accepted understanding that "[a] binding promise vests in the promisee, and in him alone, a right to compel performance of the promise." *Id.* "As between the plaintiff and defendant, there must be a privity of contract, and if the plaintiff be a mere stranger to the consideration, and no promise be made by the defendant to him, founded in privity upon it, the action is not maintainable by him, although a promise have been made by the defendant to pay the plaintiff." W. Story, *A Treatise on the Law of Contracts Not Under Seal* 83 (1844). It was also clear that a private party's interest in a *state's* contract did not, at that time, afford a judicially enforceable right. See *In re Ayers*, *supra*.

As established above, Michigan's participation in the Medicaid program is based upon a contract between the state and the federal government: Michigan submits its state plan to HHS, containing its promises to provide payment for certain medical services to indigent individuals, and in exchange HHS ***20** approves the plan and agrees to pay for a share of such services. Medicaid recipients are, at best, third party beneficiaries of the services covered under the contract. They would be "donee" beneficiaries, as compared to creditor beneficiaries, because they provide no consideration for the promises offered and are owed no pre-existing duty by the promisee.

In considering the extent to which § 1983 afforded individuals a private cause of action against the state, the Supreme Court in *Will v Michigan Department of State Police*, 491 US 58, 67 (1989) held that "in enacting § 1983 Congress did not intend to overrule well-established immunities or defenses under the common law." The Supreme Court also concluded that the members of the Congress who enacted § 1983 "were familiar with common-law principles ... and that they likely intended these common-law principle to obtain, absent specific provisions to the contrary." *Id.* at 67. If § 1983 was intended to abrogate the traditional common-law defense that third party beneficiaries could not sue the promisor for breach of the promise, it was incumbent upon Congress to make this intent clear:

The language of § 1983 also falls far short of satisfying the ordinary rule of statutory construction that if Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." ... Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States, ... or if it intends to impose a condition on the grant of federal moneys ... "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical ***21** matters involved in the judicial decision." [*Id* at 65.]

Several other Supreme Court cases also emphasize the requirement that where Congress intends to impose duties or liabilities on the states which limit their Eleventh Amendment immunity, it must do so unambiguously, making its intentions unmistakably clear in the language of the statute. See *e.g.*, *South Dakota v Dole*, 483 US 203, 207 (1987); *Seminole Tribe*, *supra* at 55-56 and 59; *Kimmel v Florida Board of Regents*, 528 US 62, 73-74 (2000); *Atascadero State Hospital v Scanlon*, 473 US 234, 242 (1985); *Pennhurst State School & Hospital v Halderman*, 451 US 1, 17 (1981) (*Pennhurst I*)

Congress has never made it "clear and manifest" that its intent in enacting § 1983 was to abrogate the defense, available to all parties at common law, that a party could not be sued for violating a contractual promise by one who was not party to the agreement, where the third party was not owed a pre-existing duty by the promisee. Contrary to Respondents' argument below, Congress's silence on this issue during the years since § 1983 was enacted cannot be deemed a "clear and manifest" expression of Congressional intent. The role of the courts is to interpret the legislative intent at the time the statute was enacted. *Central Bank of Denver v First Interstate Bank of Denver*, 511 US 164, 186-187 (1994); *United States v Wise*, 370 US 405, 411(1962). The inaction of *subsequent* Congresses is not evidence of what the Congress that enacted § 1983 intended. *Alexander v Sandoval*, 532 US 275, 292-293 (2001).

Since Congress did not, through the enactment of § 1983, abrogate the states' defense against suit by third party beneficiaries, and since the Medicaid Act creates no right directly, Respondents have no cause of action against the state for enforcement of any provision of Title XIX. *Maine v Thiboutot*, 448 US 1, 6 (1980).

***22 B. Respondents have no private right of action under the EPSDT provisions of the Medicaid Act.**

The Court of Appeals in this case misapplied this Court's decision in *Blessing v Freestone, supra,* when it summarily concluded that Respondents have a private right of action for alleged noncompliance with the screening and treatment provisions of the Medicaid Act. App 16a-18a. This Court's subsequent decision in *Gonzaga University v Doe,* 536 US _____ ; 122 S Ct 2268 (2002), makes it even clearer that the Court of Appeals erred in finding that a private cause of action exists in this case.

In *Blessing,* this Court articulated a 3-prong test for guiding courts in determining whether a federal statute creates a privately enforceable right:[3]

First, Congress must have intended that the provision in question benefit the plaintiff.... Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence.... Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory rather than precatory terms. [520 US at 340-341.]

However, both *Blessing* and *Gonzaga* clarify that under the first prong, it is not sufficient simply to find that a statute was intended by Congress to benefit putative plaintiffs. "[I]t is ***23** *rights,* not the broader or vaguer "'benefits' or 'interests' that may be enforced under [§ 1983]." *Gonzaga,* Slip Op at 8. To the extent that Congress intends to confer an enforceable right upon individuals, "it must make its intentions to do so unmistakably clear in the language of that statute." *Gonzaga,* Slip Op at 11, quoting *Will v Michigan Department of State Police, supra.* In this case, the specific statutory language at issue creates no such enforceable rights in the Respondents.

1. Respondents' screening, treatment and notice claims (First, Second and Third claims)

42 USC § 1396 authorizes the expenditure of federal funds for the purpose of enabling states to furnish "medical assistance" to needy individuals within the state. Federal Medicaid funds are made available to states that have submitted state plans to HHS and have received HHS approval of their plans. 42 USC § 1396a(a) specifies what must be included in every state plan. 42 USC § 1396a(a)(43) specifies that a state plan must provide for informing all eligible Medicaid recipients of the availability of EPSDT services, for providing or arranging for the provision of screening services when requested, and arranging for (directly or through referral) corrective treatment of conditions diagnosed through the screening. 42 USC § 1396d(r)(1) defines the items and services included within the term EPSDT.

The foregoing statutory provisions simply require states to include the specified EPSDT elements in their state plans as a condition of state plan approval by HHS. Nothing in these provisions speaks unequivocally or otherwise to any rights of Medicaid recipients. As such, the statutory language at issue focuses on the state and its relationship with HHS, not on the Medicaid recipient. As explained in *Alexander v Sandoval, supra,* at 289 (2001), and reiterated in *Gonzaga,* Slip Op at 13, "statutes that focus on the person regulated rather than the individuals ***24** protected create 'no implication of an intent to confer rights on a particular class of persons'.'DD'

Blessing, supra, also requires that a court look at the *specific* rights claimed by Respondents to be created under the statute. In *Blessing,* the Court rejected an undifferentiated finding that "Title IV-D creates enforceable rights in families in need of Title IV-D services." 520 US at 342. This Court rejected this approach because it "did not specify exactly which 'rights' it was purporting to recognize, but ... apparently believed that federal law gives respondents the right to have the state substantially comply with Title IV-D in all respects." *Id.* The Court emphasized that
it was incumbent upon respondents to identify with particularity the rights they claimed, since it is impossible to determine whether Title IV-D, as an undifferentiated whole, gives rise to undefined 'rights.' Only when the complaint is broken down into manageable analytic bites can a court ascertain whether such separate claims satisfy the various criteria we have set forth for determining whether a federal statute creates rights. [*Id.*]

Blessing emphasized that many provisions in funding statutes "are designed only to guide the state in structuring its

systemwide efforts .... These provisions may ultimately benefit individuals who are eligible for ... services, but only indirectly." 520 US 329, 344. In this regard, Respondents do *not* allege that Michigan's state plan fails to include any of the required EPSDT elements set forth in 42 USC § 1396a(a)(43) or § 1396d(r). See Complaint, ¶¶ 37-49 which contain all of Respondents factual allegations as to what Petitioner had allegedly done or not done in administering their EPSDT program. App 163a-167a. Respondents' only allegations as to Petitioner's actions are that Petitioner submitted statistics to HHS ***25** reflecting that Petitioner failed to meet an 80% participation goal set by HHS under 42 USC § 1396d(r), and that such fact, if true, affords Respondents a right of action to require Petitioner to improve his performance and guarantee that all eligible Medicaid recipients receive EPSDT services (whether they request them or not).

The very fact that 42 USC § 1396d(r) directs HHS to set a yearly *goal* of something less than 100% for EPSDT participation establishes that Congress did *not* intend Medicaid recipients to have individual enforceable rights under EPSDT provisions of the Medicaid Act. The right of action claimed here is very similar to the one rejected in *Blessing* in which this Court held that a statutory provision which imposed a numerical "substantial compliance" requirement on a state was *not* intended to benefit any given individual and, therefore, did not create a privately enforceable federal right.

In *Blessing*, several individuals sued state officials for allegedly failing to provide child support services under Title IV-D of the Social Security Act, claiming that they had an enforceable individual right to have the state's program achieve "substantial compliance with the requirements of the act." 520 US at 332-333. Under Title IV-A, if a state does not "substantially comply" with the requirements of Title IV-D, HHS is authorized to reduce federal funding to the state. *Id.* at 335. By regulation, HHS defined substantial compliance as 90% compliance with certain criteria and 75% compliance with other criteria. In holding that the foregoing requirements were not intended to benefit individual recipients, the Court stated:
Far from creating an individual entitlement to services, the standard is simply a yardstick for the Secretary to measure the systemwide performance of a State's Title IV-D program. Thus, the Secretary must look to the aggregate services provided by the State, not to whether ***26** the needs of any particular person have been satisfied. [*Id.* at 343.]

This Court explained that where a federal statute does not require 100% compliance, it cannot be concluded that any individual plaintiff is entitled to be within the percentage of individuals for whom compliance is compelled:
It is clear, then, that even when a State is in "substantial compliance" with Title IV-D, any individual plaintiff might still be among the 10 or 25 percent of person whose needs ultimately go unmet. Moreover, even upon a finding of substantial noncompliance, the Secretary can merely reduce the State's AFDC grant by up to five percent; she cannot, by force of her own authority, command the State to take any particular action or to provide any services to certain individuals. In short, the substantial compliance standard is designed simply to trigger penalty provisions that increase the frequency of audits and reduce the State's AFDC grant by a maximum of five percent. As such, it does not give rise to individual rights. [*Id.* at 344.]

In *Gonzaga*, the Court concluded that the Title IV-D provisions at issue in *Blessing* focus on "the aggregate services provided by the State, rather than the 'needs of any particular person'...." Slip Op at 7. As such, the statute confers no individual rights that can be enforced by § 1983. *Id* The same conclusion applies to the Title XIX Medicaid provisions at issue here. Indeed, in a just-issued decision, the Fifth Circuit Court of Appeals reached this very conclusion in another EPSDT case. See *Frazar v Ladd*, _____ F3d _____, 2002 US App LEXIS 14885, Slip Op pp 34-50 (5th Cir 2002).

***27 2. Respondents' claim for assistance in scheduling appointments (Fourth Claim).**

Respondents allege under their fourth claim that Petitioner has failed to provide EPSDT-eligible Medicaid recipients with assistance in scheduling medical appointments (they have not alleged that any plaintiff ever asked for such assistance) and that Respondents have a right of action to compel Petitioner to ensure that every recipient is offered such assistance. However, the Medicaid Act contains no requirement for providing scheduling assistance to EPSDT recipients. Any such requirements are contained only in regulations under 42 CFR 441.62 and have no counterpart in statute.

This Court's decision in *Alexander v Sandoval, supra,* forecloses any reliance on federal regulations to support a private cause of action under 42 USC § 1983, where the regulatory requirement is not included in the statute it implements, or where the statute itself does not explicitly create a private cause of action to enforce regulations promulgated under the statute. *Id* at

285-287. For this reason, as well as the reasons set forth in part II.B.1., Respondents have no right of action under their fourth claim, either.

3. Respondents' claim regarding capacity to deliver EPSDT services (Fifth Claim)

Respondents claim that Petitioner's Medicaid managed care program lacked the capacity necessary to deliver adequate medical care to EPSDT-eligible children in violation of 42 USC § 1396u-2(b)(5). This statute provides that the "*managed care organization* shall provide the State and the Secretary [of HHS] with adequate assurances (in a time and manner determined by the Secretary) that the organization" has the capacity to serve the expected enrollment.

***28** Thus, it is the MCO, *not the state*, that has the obligation to act under this provision. Under *Blessing*, *Alexander*, and *Gonzaga*, statutes directing some other entity to take action do not impose a duty upon the state that a private citizen can enforce against the state. For this reason, as well as the reasons stated in Part II.B.1., above, Respondents have no private right of action to enforce 42 USC § 1396u-2(b)(5).

III. THE AMERICAN ACADEMY OF PEDIATRICS AND AMERICAN ACADEMY OF PEDIATRIC DENTISTS LACK STANDING.

Respondents American Academy of Pediatrics (AAP) and American Academy of Pediatric Dentists (AAPD) alleged only that they are organizations representing doctors and dentists, respectively, that they promote policies that increase access to health care for low-income children, that they seek to assure that eligible children receive EPSDT services, and that the "unlawful acts and omissions of [Petitioner] have imposed otherwise unnecessary expenditures of organizational resources upon [each of them]." Complaint, ¶¶ 15, 16, App 153a-154a. These Respondents plead no violation of any rights or statutes on behalf of their members. They seek no relief on their own behalf or on behalf of any of their members.

Article III, § 2 of the Constitution confines the federal courts to deciding actual cases or controversies. *Alien v Wright,* 468 US 737 (1984). A central component of the Article III case or controversy requirement is that the litigant must have standing before it can invoke the jurisdiction of the federal court. *Id.* There are three constitutional requirements to achieving standing: 1) an injury in fact, defined as an invasion of a legally protected interest which is concrete, particularized and actual or imminent, not conjectural or hypothetical, 2) a causal connection between the injury and the complained of conduct of the defendant, and 3) likelihood that plaintiffs injury will be redressed by a remedy of the court. ***29** *Lujan v Defenders of Wildlife,* 504 US 555 (1992). This is referred to as "constitutional" standing.

In order to have constitutional standing, a plaintiff must have suffered actual harm which resulted from the challenged action. In the absence of such harm, no "case or controversy" exists between the parties. *Simon v Eastern Kentucky Welfare Rights Organization,* 426 US 26 (1976). The injury must be fairly traceable to the challenged action of the Petitioner and not the result of the independent action of some third party. *Lujan v Defenders of Wildlife, supra* at 560. The allegation of injury must be concrete and factual, not speculative. *Id.* A federal lawsuit is not a "forum for the airing of interested onlookers' concerns, nor an arena for public-policy debates." *Valley Forge Christian College v Americans United for Separation of Church and State, Inc.,* 454 US 464 (1982). "The federal courts were simply not constituted as ombudsmen of the general welfare." *Id.* The central requirement for standing is that the Respondents or one of its members has suffered personal injury as a result of Petitioner's error, and not just a generalized complaint about the way the government conducts its affairs. *Id.* It is clear from Respondents' Complaint that under these standards AAP and AAPD did not meet the minimal constitutional requirements for standing.

To have standing, an organization must also establish that it meets """"prudential" requirements for standing. *Warth v Seldin,* 422 US 490 (1975). The District Court below found it unnecessary to consider the constitutional requirements for standing, having found that AAP and AAPD clearly lacked """"prudential" standing. (App 107a-110a) Specifically, the District Court correctly found that AAP and AAPD did not assert their own legal rights, but rather sought to assert claims intended to benefit Medicaid recipients, not Medicaid providers such as themselves. Respondents' Complaint pleaded the following claims: (1) denial of EPSDT screening, (2) denial of EPSDT treatment, (3) denial of child health care outreach and ***30**

information, (4) failure to provide transportation and scheduling assistance, and (5) failure to secure capacity to deliver EPSDT services. None of these claims refers to any rights or benefits of medical providers. Further, all of the substantive relief sought in the Complaint was for the benefit of Medicaid recipients. See Complaint, p 30 (R. 1, Apx 46).

While the District Court below would also have been correct to find that AAP and AAPD lacked constitutional standing as well, there is no question that these Respondents lacked prudential standing and that the Court of Appeals erred in reversing the District Court's dismissal on standing grounds. See also, *Blessing v Freestone, supra*, at 341-345.

CONCLUSION

This case raises important questions of federal law and State-Federal relationships that should be settled by this Court. The petition for a writ of certiorari should be granted.

Appendix not available.

Footnotes

[1] Robert Smedes is no longer employed by the State of Michigan and his position, Deputy Director for Medical Services Administration, no longer exists.

[2] In Michigan, judicial review of such decision is provided pursuant to MCL 400.37.

[3] As noted in Part II. A., *supra, Blessing* did not reach the question whether § 1983 ever affords a private right of action for claimed violations of Spending Clause programs.